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EXAMINER

KIDWELL, MICHELE M

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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte EARL DAVID BROCK, DUANE GERARD KRZYSIK,
RHONDA SUE SOLBERG, STEPHEN LAWRENCE MILLER, and
DAVID JOHN TYRRELL

Appeal 2009-002943
Application 10/028,338
Technology Center 3700

Decided: August 28, 2009

Before DONALD E. ADAMS, DEMETRA J. MILLS, and
LORA M. GREEN, *Administrative Patent Judges*.

ADAMS, *Administrative Patent Judge*.

DECISION ON APPEAL

This appeal under 35 U.S.C. § 134 involves claims 1-23, the only claims pending in this application. We have jurisdiction under 35 U.S.C. § 6(b).

STATEMENT OF THE CASE

The claims are directed to a system for improving skin health of a wearer of absorbent articles. Appellants state that the “claims stand or fall together” (App. Br. 3). Therefore we limit our analysis to representative claim 1. 37 C.F.R. § 41.37(c)(1)(vii).

1. A system for improving skin health of a wearer of absorbent articles comprising:

(a) a disposable absorbent article that includes an outer cover; a liquid permeable bodyside liner that defines a bodyfacing surface and that is connected in superposed relation to the outer cover; an absorbent body that is located between the bodyside liner and the outer cover; and a skin care composition on at least a portion of the bodyfacing surface of the bodyside liner that includes from about 40 to about 95 percent by weight of emollient and from about 5 to about 60 percent by weight of viscosity enhancer; used in conjunction with

(b) a wet wipe that includes a nonwoven substrate and a skin care solution that includes from about 90 to about 99 percent by weight of hydrophilic solvent, from 0 to about 30 percent by weight of surfactant and from about 0.1 to about 10 percent by weight of extracted botanical active.

The Examiner relies on the following evidence:

Paulis	US 4,738,678	Apr. 19, 1988
Blieszner	US 5,648,083	Jul. 15, 1997
Klofta	US 2003/0077307 A1	Apr. 24, 2003

The rejection presented by the Examiner is as follows:

Claims 1-23 stand rejected under 35 U.S.C § 103(a) as unpatentable over the combination of Paulis, Klofta, and Blieszner.

We affirm.

ISSUE

Have Appellants met their burden of establishing error in the Examiner's prima facie case of obviousness?

FINDINGS OF FACT

FF 1. “Paulis discloses an absorbent article used in conjunction with a wet wipe” (Ans. 3).

FF 2. Paulis does not teach an absorbent article or a wet wipe that includes a skin care solution (*id.*).

FF 3. Klofta teaches “a system for improving skin health of a wearer comprising a disposable absorbent article that includes,” *inter alia*, “a skin care composition on at least a portion of the bodyfacing surface of the bodyside liner that includes from about 40 to about 95 percent by weight of emollient . . . and from about 5 to about 60 percent by weight of viscosity enhancer” (*id.*).

FF 4. The Examiner finds that Blieszner “teaches a wet wipe meeting the claimed limitations” (*id.*).

FF 5. The Examiner finds that Blieszner teaches that a wet wipe comprising such a “skin care solution provides effective protection against perineal dermatitis as taught by Blieszner” (Ans. 4).

PRINCIPLES OF LAW

In proceedings before the Patent and Trademark Office, the Examiner bears the burden of establishing a prima facie case of obviousness based upon the prior art. *In re Fritch*, 972 F.2d 1260, 1265 (Fed. Cir. 1992). On appeal to this Board, Appellants must show that the Examiner has not sustained the required burden. *See Ex parte Yamaguchi*, 88 USPQ2d 1606, 1608 and 1614 (BPAI 2008) (precedential); *Ex parte Fu*, 89 USPQ2d 1115, 1118 and 1123 (BPAI 2008) (precedential).

“The combination of familiar elements according to known methods is likely to be obvious when it does no more than yield predictable results.” *KSR Int’l Co. v. Teleflex Inc.*, 550 U.S. 398, 416 (2007). It is proper to “take account of the inferences and creative steps that a person of ordinary skill in the art would employ.” *Id.* at 418. (*See also id.* at 421) (“A person of ordinary skill is also a person of ordinary creativity, not an automaton.”). 35 U.S.C. § 103(a) “forbids issuance of a patent when ‘the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains.’” *KSR*, 550 U.S. at 406 (quoting 35 U.S.C. § 103(a)).

ANALYSIS

Appellants’ claim 1 requires that “a skin care composition on at least a portion of the bodyfacing surface of the bodyside liner” (Claim 1). Paulis teaches a combination of an absorbent article and a wet wipe (FF 1). Klofta teaches “a system for improving skin health of a wearer comprising a disposable absorbent article that includes,” *inter alia*, “a skin care

composition on at least a portion of the bodyfacing surface of the bodyside liner” (FF 3). The Examiner concludes that “[i]t would have been obvious to one of ordinary skill in the art to modify the topsheet of Paulis to provide a skin care composition because the skin care composition is useful for protecting the skin as taught by Klofta” (Ans. 4). Accordingly, we are not persuaded by Appellants’ contention that “[t]he Examiner has provided no citation in either Klofta or Paulis to indicate that one skilled in the art would be motivated to take the composition of Klofta and add it to the topsheet of Paulis” (App. Br. 5). To the contrary, the evidence relied upon by the Examiner suggests that a person of ordinary skill in the art would make this modification to improve the skin health of a wearer of an absorbent article (FF 3). “The combination of familiar elements according to known methods is likely to be obvious when it does no more than yield predictable results.” *KSR*, 550 U.S. at 416.

Appellants’ claim 1 requires a wet wipe that includes, *inter alia*, a skin care solution (Claim 1). Paulis teaches a combination of an absorbent article and a wet wipe (FF 1). Blieszner teaches wet wipe comprising a skin care solution to provide effective protection against perineal dermatitis (FF 4-5). The Examiner concludes that it “would have been obvious to one of ordinary skill in the art to modify the wipe of Paulis to provide a skin care solution because the skin care solution provides effective protection against perineal dermatitis as taught by Blieszner” (Ans. 4). Accordingly, we are not persuaded by Appellants’ contention that:

[T]he Examiner has provided no motivation as to why one skilled in the art would take the second, and seemingly redundant, step of modifying the skin care solution of the wipe,

as per Blieszner, when the skin care composition has already been added to the diaper, as per Klofta, to “protect the skin.”

(App. Br. 5). To the contrary, the evidence relied upon by the Examiner suggests that a person of ordinary skill in the art would make this modification to provide effective protection against perineal dermatitis (FF 5). *KSR*, 550 U.S. at 416.

Appellants’ contention that “one skilled in the art would [not] be motivated to combine all three references to create a synergistic system comprising both a disposable absorbent article with a specific skin care composition on the bodyside liner and a wet wipe having a specific skin care solution” (App. Br. 5; *see also* App. Br. 6-7). We are not persuaded. The combination of the prior art relied upon by the Examiner suggests the use Klofta’s absorbent article comprising a skin care composition together with Blieszner’s wet wipe comprising a skin care composition in combination as suggested by Paulis. In the alternative, we find that the prior art of record suggests the modification of Paulis’ combination of absorbent article and wet wipe to include a skin care composition as taught by Klofta and Blieszner respectively (*see, e.g.*, Ans. 6-7). For the same reasons we disagree with Appellants’ contention that the Examiner has relied on impermissible hindsight (App. Br. 5; *see also* App. Br. 6 (“the Examiner has . . . found ‘parts’ of various ‘products’ and has pieced them together based on Appellants’ disclosure”))).

Appellants do not identify, and we do not find, evidence of synergy on this record that would compel a different conclusion. In this regard, we recognize that Appellants do not dispute that Klofta and Blieszner teach a

skin care composition on an absorbent article and wet wipe, respectively that meet the requirements of Appellants' claimed invention.

Because the Examiner's rejection is based on the combination of Paulis, Klofta, and Blieszner, we are not persuaded by Appellants' arguments concerning the hypothetical combinations of Paulis and Klofta or Paulis and Blieszner (*see* App. Br. 6).

CONCLUSION OF LAW

Appellants have failed to meet their burden of establishing error in the Examiner's prima facie case of obviousness. The rejection of claim 1 under 35 U.S.C § 103(a) as unpatentable over the combination of Paulis, Klofta, and Blieszner is affirmed. Claims 2-23 fall together with claim 1.

TIME PERIOD FOR RESPONSE

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a).

AFFIRMED

alw

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